THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
SOUTHERN DISTRICT

NO. 04-E-0062

PENNICHUCK CORPORATION, PENNICHUCK WATER WORKS, INC., PENNICHUCK EAST UTILITY, INC., AND PITTSFIELD AQUEDUCT COMPANY, INC.

V.

CITY OF NASHUA

OPINION AND ORDER

LYNN, C.J.

The defendant City of Nashua (City) has begun proceedings before the New Hampshire Public Utilities Commission (PUC) seeking to acquire by eminent domain certain plants and property owned by the plaintiffs, Pennichuck Corporation and its wholly owned subsidiaries[1] (Pennichuck), in order to establish a publicly owned or controlled water utility, as authorized by RSA chapter 38 (1997). Pennichuck instituted this declaratory judgment action in an effort to terminate or limit the City's attempt to condemn its property. The matter comes before the court at this time on the parties' cross motions for summary judgment.[2] With the exception of one claim which is not yet ripe for adjudication and another as to which dismissal without prejudice is appropriate, I conclude

[1] Pennichuck Water Works, Inc., Pennichuck East Utility, Inc., and Pittsfield Aqueduct Company, Inc. are each wholly owned subsidiaries of Pennichuck Corporation. The foregoing subsidiaries are all public utilities regulated by the PUC. Pennichuck Corporation also has two other subsidiaries, Pennichuck Services Corporation and Southwood Development Corporation, which are not regulated utilities. The latter two corporations are not named plaintiffs in this action.

[2] Prior to moving for summary judgment, the City also had filed a motion to dismiss. Inasmuch as the City's summary judgment motion incorporates the arguments asserted in the motion to dismiss, there is no need for me to separately address the motion to dismiss.

that the City's motion for summary judgment must be granted and Pennichuck's cross motion must be denied.

I.

For a moving party to prevail on a motion for summary judgment, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits filed, [must] show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (1997). In ruling on the motion, the court must construe all materials submitted in the light most favorable to the nonmovant. Metropolitan Prop. & Liab. Ins. Co. v. Walker, 136 N.H. 594, 596 (1993). However, the party opposing the motion "may not rest upon [the] mere allegations or denials of his pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV; Gamble v. University of New Hampshire, 136 N.H. 9, 16-17 (1992); ERA Pat Demarais Assoc's. v. Alex. Eastman Foundation, 129 N.H. 89, 92 (1986). A dispute of fact is "genuine" if "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party," and "material" if it "might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)(construing analogous language of Fed.R.Civ.P. 56); accord. Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990).

Where the nonmoving party bears the burden of persuasion at trial, it must "make a showing sufficient to establish the existence of [the] element[s] essential to [its] case" in order to avoid summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the moving party bears the burden of persuasion at trial, it

must support its position with evidence "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." Lopez v. Corporacion Azucarera de Puerto Rico, 938 F.2d 1510, 1516 (1st Cir. 1991).

II.

The record establishes the following pertinent facts. Pennichuck and its subsidiaries operate public utilities which provide water supply services to approximately 35,000 customers in New Hampshire. Although most of these customers are located in Nashua and surrounding communities, Pennichuck's operations extend to communities as far away as Pittsfield, New Hampshire. All of the Pennichuck companies have their headquarters in Nashua.

On April 29, 2002, Pennichuck entered into an Agreement and Plan of Merger with Philadelphia Suburban Corporation ("PSC"). Under this agreement, Pennichuck was to become a direct and wholly owned subsidiary of PSC. On June 14, 2002, Pennichuck filed a petition with the PUC seeking approval of the merger. The City moved to intervene in the PUC proceedings and objected to the merger.

On November 26, 2002, the City's board of alderman adopted, by a vote of 14 to 1, a resolution to acquire the plant and property of Pennichuck's water works system. A confirming vote by the Nashua electorate was held on January 14, 2003. The referendum question asked if the voters would authorize the City to acquire all or a portion of the water works system then serving the inhabitants of Nashua. The referendum was approved by the voters by a wide margin.

Soon after the referendum, PSC terminated its plans to merge with Pennichuck. Thereafter, on February 5, 2003, the City sent written notification to each of the Pennichuck utilities, detailing the assets which it sought to acquire, and inquiring whether the utilities were willing to sell such assets to the City. On March 25, 2003, Pennichuck responded in writing, indicating that it did not wish to sell any of its assets to the City. The following day the City notified Pennichuck that it intended to petition the PUC to condemn the Pennichuck assets identified in its inquiry letters.

Between March and November 2003, the City and Pennichuck engaged in negotiations concerning the possible sale of some or all of Pennichuck's assets to the City. On November 30, 2003, Nashua extended a formal offer to purchase Pennichuck for $121 million. Pennichuck rejected this offer on December 15, 2003, terminated negotiations with the City on January 27, 2004, and commenced the present lawsuit on February 4, 2004.

On March 24, 2004, the City filed a petition with the PUC, asking the agency to find that the City's condemnation of Pennichuck's assets is in the public interest and to determine the damages which the City must pay Pennichuck as a result of the taking.

III.

Pennichuck's petition asserts the following four claims: (1) that RSA 38 violates Pennichuck's constitutional right to the equal protection of the laws because it creates different condemnation procedures for the municipal acquisition of utility property than for the condemnation of other property; (2) that

the RSA 38 condemnation procedure is both per se unconstitutional and unconstitutional as applied in this case because it results in an inverse condemnation of Pennichuck's property; (3) that the City is prohibited from proceeding with the condemnation proceedings by the doctrine of laches; and (4) that the City's notices pursuant to RSA 38:6 are overbroad and invalid insofar as they seek to acquire property of Pennichuck not specifically needed to provide water service to consumers located within the City of Nashua. Before addressing these claims, it will be helpful to review the statutory scheme established by the legislature for the "municipalization" of public utilities.

RSA chapter 38 empowers municipalities to take by eminent domain privately-owned electric, gas and water utilities in order to maintain and operate the same as publicly-owned facilities. RSA 38:2. In order to initiate the process of acquiring a utility, there must first be an affirmative vote by two-thirds of the members of the municipal governing body and this vote must then be confirmed by a majority vote of the qualified voters at a regular election or special meeting called for this purpose. RSA 38:3. A favorable confirming vote creates a rebuttable presumption that the acquisition is in the public interest. Id. Within thirty (30) days of the confirming vote, the municipality must notify the utility and inquire if it is willing to sell the identified plant and property located within the municipality, as well as "that portion, if any, lying without the municipality, which the public interest may require, pursuant to RSA 38:11 as determined by the [PUC]." RSA 38:6. The utility is given sixty (60) days to respond. RSA 38:7.

The parties may then negotiate and reach a tentative agreement on the assets to be sold and the sale price, subject to ratification by a vote of the municipality to issue the necessary revenue bonds for the acquisition price. RSA 38:8 and 13. If no agreement is reached, either party may petition the PUC to determine whether it is in the public interest for the municipality to purchase some or all of the utility's property located inside or outside of the municipality. RSA 38:9. The PUC also determines the amount of "just compensation" or damages that the municipality must pay for the assets in question. RSA 38:9 and 10. After the PUC sets the acquisition price, the municipality must decide whether or not to purchase the assets for that price by a vote to issue revenue bonds pursuant to RSA 33-B. RSA 38:13. If the vote is in the affirmative, it constitutes a ratification by the municipality to acquire the assets at the price set by the PUC. If the vote is in the negative, no further proceedings under RSA 38 can be commenced for a period of two (2) years. RSA 38:13.

A.

Count I of Pennichuck's petition asserts that the condemnation procedure established under RSA chapter 38 violates the company's equal protection rights in two ways. First, unlike other condemnation statutes, which provide for a de novo appeal to superior court on the issue of the necessity for the taking, see RSA 231:8, :34 (1993); V.S.H. Realty, Inc. v. City of Manchester, 123 N.H. 505, 508 (1983); RSA 205:1; Merrill v. City of Manchester, 124 N.H. 8, 15 (1983), RSA 38 grants the PUC authority to make the necessity determination with only a limited right of appeal to the supreme court pursuant to RSA 541:6 and :13

(1997). See Appeal of Ashland Elec. Dept., 141 N.H. 336 (1996). Second, again unlike other condemnation statutes, i.e., RSA 498-A (1997) and RSA 371 (1995), which permit a jury to make the ultimate determination of the amount of damages to be assessed, RSA 38 grants the PUC authority to assess damages and contains no provision allowing an appeal to superior court for a jury trial on the damages issue.

The threshold determination that must be made in conducting an equal protection analysis is whether the state action in question treats similarly situated persons differently. Malnati v. State, 148 N.H. 94, 98 (2002). Pennichuck argues that it is similarly situated to all other condemnees who face the prospect of having their property taken by governmental authority. The City, on the other hand, asserts that the type of property that is subject to condemnation under RSA 38 – plants and property owned by public utilities – is fundamentally different from other kinds of property that may become subject to condemnation. Among other things, the City points to the facts that public utilities often exercise monopoly powers and are subject to comprehensive regulation by the PUC. The City asserts that these factors make necessity and damages determinations regarding public utility property particularly complex, and thus justify the legislature's decision to place such determinations in the hands of the agency (the PUC) with the requisite expertise.

Dealing first with the necessity issue, I need not decide whether the owners of public utility property are similarly situated to the owners of other property because, even assuming they are similarly situated, the procedures

established under RSA 38, whereby the PUC makes the determination of whether the condemnation is in the public interest, does not deny Pennichuck equal protection of the laws. Although the supreme court's decisions in Gazzola v. Clements, 120 N.H. 25 (1980) and Merrill contain some rather broad language, the narrow holdings of those cases was simply that, where the legislature had granted the right to a pre-taking necessity hearing for property condemned for some purposes, it was a violation of equal protection to deny the right to any pre-taking hearing for property condemned for other purposes. In neither of these cases did the court hold that the procedures to be followed in making necessity determinations must be identical in all condemnation proceedings. Indeed, in Merrill, after finding that the absence of a pre-taking hearing for property condemned for redevelopment purposes violated the equal protection rights of the plaintiff in that case because such a hearing was allowed where property is taken for highway purposes, the court went on to hold that, because there had been a full evidentiary hearing at the superior court level, there was no need for proceedings to begin anew before the board of mayor and alderman. 124 N.H. at 16. Instead, the court held that it was a sufficient remedy to remand the case to the superior court so that the master could make a proper, de novo, determination of necessity. Id. In other words, the court seemed to be saying that it was a sufficient vindication of the plaintiff's equal protection rights if he was afforded one full and fair hearing on the issue of necessity, even though under the highway condemnation statute a condemnee would have the right to two such hearings – the first before the municipal governing body and the second, de

novo one, before the superior court. Surely the court would not have fashioned this type of relief if it believed that the procedures for takings for redevelopment purposes had to be exactly the same as the procedures for takings for highway purposes. Pennichuck has failed to make any showing that the hearing on necessity (public interest) which it will receive before the PUC under RSA 38:9 is in some way inferior to a necessity hearing that would be conducted before the superior court under any of the other statutory schemes discussed above. See American Party of Texas v. White, 415 U.S. 767, 781 (1974) (party claiming an equal protection violation bears burden of demonstrating discrimination "of some substance"); cf. Jackson Water Works v. Public Utilities Com'n., 793 F.2d 1090, 1096 (9th Cir. 1986) (quoting American Motorists Ins. Co. v. Starnes, 425 U.S. 637, 644-45 (1976) ("it is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights.") (other citations and internal quotations omitted)).

Furthermore, in Malnati the court made it clear that the legislature has the power to dispense with necessity determinations altogether where it decides, "as a matter of legislative policy," that a certain class of property should be taken for public purposes. See 148 N.H. at 100. The Malnati court found no denial of equal protection in the legislature's disallowance of individual necessity determinations in connection with the State's condemnation of the reversionary interests in railroad rights-of-way, notwithstanding the fact that individual determinations are permitted for other types of takings. Under the rationale of

Malnati, the legislature presumably could, without violating equal protection, allow the governing bodies of municipalities to make similar policy determinations concerning whether utilities operating within their boundaries should be "municipalized" without affording any necessity hearing at all.

Based on the above analysis, I conclude that RSA 38:9, which grants Pennichuck the right to a single full and fair hearing before the PUC on the issue of whether the City's proposed condemnation is in the public interest, does not violate Pennichuck's equal protection rights.

More troubling is the question of whether RSA 38 deprives Pennichuck of equal protection by failing to provide for a jury trial on the issue damages. Although there is no absolute constitutional right to a jury trial in eminent domain proceedings, Whelton v. State, 106 N.H. 362, 363 (1965), the legislature has conferred this right by statute in all condemnation proceedings except those carried out pursuant to RSA 38. The extraordinary difficulty of valuing utility property arguably provides a sufficiently compelling state interest to justify the legislature's choice to assign this highly specialized task to the experts at the PUC. See, e.g., Southern N.H. Water Co. v. Town of Hudson, 139 N.H. 139, 142 (1994). But as Pennichuck correctly points out, when utility property is proposed for condemnation by another utility rather than by a municipality the complexity of determining value does not preclude the condemnee from insisting upon a jury trial to assess just compensation. See RSA 371:10. I conclude that it is unnecessary for me to decide at this juncture whether the denial of a jury trial on damages deprives Pennichuck of equal protection because the issue is not yet

ripe for adjudication. Even if Pennichuck's position on this point is meritorious, the appropriate remedy would not be to invalidate the entire statutory scheme. Rather, as was done in Gazzola and Merrill, the remedy would be for this court to incorporate into RSA 38 the appeal and jury trial features of RSA 371:10. There is no need to make a ruling on this matter now. The PUC has not even made a decision on necessity at this point, let alone held a hearing on damages. If and when the PUC reaches the issue of damages and renders a decision adverse to Pennichuck, the company may then press its claim that it is entitled to have damages reassessed by a jury in the superior court. See Appeal of Wintle, 146 N.H. 664, 666 (2001) (court should decide constitutional issues only when it is necessary to do so).

B.

Count II of Pennichuck's petition alleges that RSA 38 is unconstitutional both per se and as applied to the facts of this case because the statute's procedures result in the inverse condemnation of Pennichuck's property. With respect to the as-applied challenge, Pennichuck now concedes that it has an adequate alternative remedy for this claim in the parallel damages action which it originally filed in this court, docket number 04-C-169, and which has since been removed to federal court. Pennichuck therefore requests that its as-applied claim be dismissed without prejudice. Although the City asserts that this claim should be dismissed with prejudice, I treat Pennichuck's request as the equivalent of a motion for voluntary nonsuit and, in the absence of any showing by the City of

unfair prejudice, grant the dismissal without prejudice. See Cadle Co. v. Proulx, 143 N.H. 413, 416 (1999).

As for the remainder of count II, Pennichuck's facial attack on RSA 38 is based on the theory that an inverse condemnation of its property necessarily results from the following features of the statutory scheme: (1) the absence of a provision setting a time limit within which a municipality must initiate condemnation proceedings; and (2) the so-called "second look" provision of RSA 13, under which, even after the PUC has made a finding that the condemnation is in the public interest and has fixed the amount of damages to be paid, a municipality may decline to acquire the property if the voters fail to approve the issuance of revenue bonds pursuant to RSA 33-B to finance the acquisition. I find Pennichuck's arguments unavailing.

"Inverse condemnation" occurs when governmental actions or regulation, short of a physical invasion or taking, so substantially interferes with property that the owner is deprived of all or nearly all economically viable use thereof. See Sanderson v. Town of Candia, 146 N.H. 598, 600 (2001); Burrows v. City of Keene, 121 N.H. 590, 598 (1981). However, "[m]ere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership . . . and cannot be considered as a `taking' in the constitutional sense." Smith v. Wolfboro, 136 N.H. 337, 346 (1992) (quoting Agins v. Tiburon, 447 U.S. 255, 263 n.9 (1980)).

In this case, Pennichuck has not shown that any delays allegedly attributable to the challenged aspects of RSA 38 rise to the level of a de facto

taking of its property. While Pennichuck's business operations may have been affected by uncertainty and the value of its stock may have fluctuated over the period since the City first announced its intent to institute condemnation proceedings, and while Pennichuck may have incurred legal and other fees in fighting the City's attempted taking, these are simply the inherent risks of ownership in a system, such as ours, where all property is held subject to the sovereign's exercise of the power of eminent domain. See Cayon v. City of Chicopee, 277 N.E.2d 116, 119 (Mass. 1971). At no point has Pennichuck been deprived of the economically viable use of its property, nor will such a deprivation occur unless and until all necessary steps to the condemnation process, including the RSA 38:13 ratification vote, have been completed. Because no taking occurs until after the ratification vote, even assuming that the electorate ultimately fail to approve the acquisition at the price set by the PUC, the effect would be merely a discontinuance of the condemnation – an eventuality which does not give rise to a constitutional right to be compensated for losses and expenses in the absence of bad faith or unreasonable delay. 6 Nichols on Eminent Domain § 26D.01[6] (1999).

C.

In Count III of its petition, Pennichuck alleges that the City is barred from proceeding with its condemnation efforts by the doctrine of laches. Specifically, Pennichuck asserts that the one year delay between March 2003, when Pennichuck rejected the City's offer to purchase, and March 2004, when the City filed its petition with the PUC, was unreasonable and prejudicial to Pennichuck.

The City maintains that this one year interval is not unreasonable and is explained by the City's efforts during this period to reach an agreement with Pennichuck through negotiations.

The general rule is that where a condemnation statute does not contain a specific time limitation, condemnation proceedings must be instituted within a reasonable time. 6 Nichols § 24.07[1] (1995). Laches is an equitable doctrine that will bar litigation due to the inequity of permitting the claim to be enforced. See Town of Seabrook v. Vachon Mgmt., Inc., 144 N.H. 660, 668 (2000). "The party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay." Appeal of Plantier, 126 N.H. 500, 505 (1985).

Here, Nashua has produced proof by way of the affidavits of Mayor Streeter and Alderman McCarthy detailing the efforts the City undertook between March 2003 and January 2004 to reach a negotiated acquisition of Pennichuck's assets. Pennichuck has offered no counter affidavits or other competent evidence to refute the sworn averments of Messrs. Streeter and McCarthy. See RSA 491:8-a, IV (1997). In the absence of such evidence, I hold as a matter of law that the City did not act unreasonably in determining not to file its petition with the PUC while it was engaged in active negotiations with Pennichuck aimed at resolving the acquisition matter . Petition of Bianco, 143 N.H. 83, 85 (1998) ("public policy encourages voluntary acquisitions from landowners before conducting involuntary condemnation proceedings"); see New Hampshire Donuts, Inc. v. Skipitaris, 129 N.H. 774, 785 (1987).

Other considerations also militate against application of laches in this case. Pennichuck obviously cannot seriously claim to have been surprised by the City's PUC filing, as it has been aware at all times that City was pursuing acquisition of Pennichuck's property. See Lineham v. S. New England Prod. Credit Assoc'n, 122 N.H. 179, 183 (1982). Moreover, laches has been allowed against governmental entities, such as a municipality, only in "extraordinary and compelling circumstance." Vachon Mgmt., 144 N.H. at 668. On the record before me, no such circumstances have been shown to exist.

D.

Pennichuck contends in count IV of its petition that RSA 38 limits the City to condemning only that portion of Pennichuck's property which is either (1) located within the geographical limits of Nashua or (2) if located outside Nashua, is necessary to provide water services within the City. Pennichuck therefore seeks to obtain a ruling from me at this time that the City may not condemn the property of its subsidiaries, such as Pennichuck East Utility or Pittsfield Aqueduct Company, whose operations have no connection with Nashua. The City responds that the PUC has primary jurisdiction to determine the extent of a municipal taking that is in the public interest, and that the court therefore should decline to rule on this claim. I agree with the City.

In order to encourage the exercise of agency expertise, preserve agency autonomy, and promote judicial efficiency, New Hampshire has long recognized the doctrine of primary jurisdiction. The doctrine mandates that a court refrain from exercising its jurisdiction to decide a question until it has first been decided

by a specialized agency that also has jurisdiction to do so. New Hampshire Div. of Human Servs. v. Allard, 138 N.H. 604, 607 (1994). See also Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 258 (1998) ("primary jurisdiction in an agency requires judicial abstention until the final administrative disposition of an issue, at which point the agency action may be subject to judicial review") (citation and internal quotations omitted).

Under RSA 38, the legislature has charged the PUC with the responsibility of determining the extent, if any, of the acquisition of Pennichuck's property outside Nashua which is in the public interest. RSA 38:6, :9, :11. Given the myriad of economic factors and other considerations which are likely to be entailed in making this decision, there is no question that the expertise possess by the PUC makes it the logical forum to grapple with these issues in the first instance.

IV.

For the reasons stated above, the City's motion for summary judgment is hereby granted as to counts III and IV of the petition and with respect to that portion of count II of the petition which asserts a claim for per se taking of Pennichuck's property by inverse condemnation. That portion of count II alleging an as-applied inverse condemnation is dismissed without prejudice. The City's motion for summary judgment also is granted with respect to count I of the petition but this ruling is made without prejudice to Pennichuck's ability to reassert its claimed right to a jury trial on the issue of just compensation if it is dissatisfied with the PUC's assessment of damages. Pennichuck's motion for

summary judgment is denied in all respects. The City's request for an award of attorney's fees is also denied.

BY THE COURT:

August 31, 2004

_____
ROBERT J. LYNN
Chief Justice